

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR

(2018–2022) (Remand)

**SOUNDEXCHANGE’S BRIEF IN FURTHER OPPOSITION TO
MUSIC CHOICE’S MOTION TO COMPEL**

SoundExchange, Inc. (“SoundExchange”) respectfully submits this brief pursuant to the Judges’ July 29, 2021 *Order Granting in Part, and Denying in Part, Music Choice’s Motion to Compel, and Providing for Further Submissions*, Dkt. 25541 (the “July 29 Order”). This information is intended to answer the Judges’ questions and assist them in ascertaining the applicability of SoundExchange’s claim of work-product privilege over certain documents. SoundExchange also submits a declaration from Bradley E. Prendergast, Assistant General Counsel, Licensing & Enforcement, at SoundExchange in further support of its remaining assertions of work-product privilege.

I. Background

On April 29, 2021, Music Choice filed a Motion to Compel, seeking a subset of documents responsive to Document Request No. 12 within Music Choice’s Requests for Production of Documents. Dkt. 23887 at 1 (seeking to compel the production of “investigation and analysis conducted by SoundExchange’s accountants at Prager Metis with respect to Music Choice’s defensive audits conducted by BDO”). On May 27, 2021, after briefing on the Motion

to Compel was complete, the Copyright Royalty Judges (“Judges”) directed SoundExchange to provide a privilege log identifying documents it had withheld in response to Document Request No. 12. Dkt. 25317. On June 11, 2021, SoundExchange provided a privilege log that identified twelve relevant documents as protected by the work product rule.¹ SoundExchange’s Privilege Log, Dkt. 25332 (June 11, 2021); *see also* SoundExchange, Inc.’s Opposition to Music Choice’s Motion to Compel the Production of Documents, Dkt. 23906 (May 10, 2021). These documents include communications with in-house and outside counsel, and were prepared by or at the direction of counsel, in anticipation of litigation. At the Judges’ direction, SoundExchange also provided the documents identified in the privilege log for *in camera* review. *See* Dkt. 25337. On July 29, 2021, the Judges issued an order granting in part and denying in part the Motion to Compel, and directing the parties to provide further briefing. Dkt. 25541. The instant brief responds to the July 29 Order.

Some understanding of the history of litigation between SoundExchange and Music Choice is necessary to provide context for SoundExchange’s claims of work product privilege. Music Choice has litigated against SoundExchange in a rate-setting proceedings, beginning with the first webcasting proceeding in 2000-2002 (“*Web I*”) and including every proceeding involving the rates and terms for pre-existing subscription services (“*SDARS I*,” “*SDARS II*,” and “*SDARS III*”).² Prendergast Decl. ¶ 9.

¹ SoundExchange also asserted an accountant-client privilege with respect to certain documents, but, in light of the Judges’ July 29 Order, SoundExchange withdraws its request to withhold documents on this basis.

² *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,263 (July 8, 2002); *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080, 4080 (Jan. 24, 2008); *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 31842, 31843 (May 28, 2013); *Determination of Royalty Rates and Terms for Transmission*

In addition, SoundExchange currently has pending litigation against Music Choice in the United States District Court for the District of Columbia, based on Music Choice’s systematic underpayment of statutory royalties for its business establishment service (“BES”). *See SoundExchange v. Music Choice*, No. 1:19-cv-999-RBW (D.D.C., filed Apr. 10, 2019). This action arose from SoundExchange’s audit of Music Choice by Prager Metis CPAs for the years of 2013-2016 that took place from 2016 to 2018. Although that audit allowed Prager Metis to evaluate Music Choice’s BES royalty payments (which were millions of dollars short), Music Choice refused to provide access to requested information regarding its PSS, on the grounds that the so-called defensive audit provision then codified at 37 C.F.R. § 382.6(e) excused them from complying. Prendergast Decl. ¶ 11. All of the privileged documents now under consideration were created in connection with SoundExchange’s audit (or attempted audit) of Music Choice. In 2017 and 2018, when these documents were created, the *SDARS III* proceeding was being actively litigated, Prendergast Decl. ¶ 12; and, SoundExchange was working with outside counsel to develop the claims in its BES underpayment lawsuit. The following table notes key events from this period.

January 5, 2016	Notice Announcing Commencement of Proceeding filed in <i>SDARS III</i>
October 19, 2016	Written direct statements filed in <i>SDARS III</i> , <i>see, e.g.</i> , Dkt. 4850
December 22, 2016	SoundExchange filed its Notice of Intent to Audit Music Choice for CY 2013-2015, kicking off the Music Choice Audit
February 17, 2017	Written rebuttal statements filed in <i>SDARS III</i> , <i>see, e.g.</i> , Dkt. 23628.
February – March 2017	Rebuttal discovery period in <i>SDARS III</i>

of Sound Recordings by Satellite Radio and ‘Preexisting’ Subscription Services (SDARS III), 83 Fed. Reg. 65210, 65,210 (Dec. 19, 2018).

April 12, 2017 – May 18, 2017	<i>SDARS III</i> Hearing
June 19, 2017	Initial findings of fact and conclusions of law filed in <i>SDARS III</i> , <i>see, e.g.</i> , Dkt. 4725
June 27, 2017	SoundExchange filed its Notice of Intent to Audit Music Choice for CY 2016
June 29, 2017	Reply findings filed in <i>SDARS III</i> , <i>see, e.g.</i> , Dkt. 4740
October 5, 2017	Judges referred novel questions of law involving Music Choice’s internet transmissions to the Register of Copyrights, Dkt. 13833.
November 29, 2017	Register’s Opinion issued, Dkt. 1652.
December 14, 2017	Initial Determination in <i>SDARS III</i> issued, Dkt. 1671.
April 17, 2018	Denial of Music Choice’s Motion for Rehearing, Dkt. 2426.
July 3, 2018	Prager Metis issues Final Report on Music Choice Audit
December 18, 2018	Final Determination in <i>SDARS III</i> issued, Dkt. 3447
April 10, 2019	SoundExchange filed underpayment case regarding BES royalties in D.D.C.
August 18, 2020	D.C. Circuit issued opinion, remanding this case to the Judges

II. Legal Standard

Conversations among counsel and documents prepared at the request of counsel in anticipation of litigation fall squarely within the bounds of work product that is protected from disclosure. *See* Fed. R. Civ. P. 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”). Although the work product rule “does not extend to every written document generated by an attorney,” the Judges have recognized the “documents prepared in contemplation” or “anticipation of litigation or for trial” are protected. July 29 Order at 1.

When considering whether a document is prepared “in anticipation of litigation,” [the D.C. Circuit] employs a “because of” test, inquiring whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of

litigation. . . . Where a document would have been created “in substantially similar form” regardless of the litigation, work product protection is not available.

Id. at 2 (citing *F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015) (internal citations omitted)); *see also In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 19 (D.D.C. 2008) (work-product privilege is applicable to documents prepared in anticipation of administrative litigation). Work-product protection is not limited to documents prepared by counsel. *See United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010) (“[T]he question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product.”). And, the work product doctrine applies to documents prepared in connection with ongoing litigation as well as prospective litigation. *Exxon Corp. v. F. T. C.*, 663 F.2d 120, 129 (D.C. Cir. 1980).

III. Discussion

The following discussion identifies each disputed document by the item number used in the July 29 Order, responds to the questions raised therein, and explains the applicability of the work product rule on a document-by-document basis.

Item #1: The remaining issues in dispute with regard to Item #1 involve only the most recent-in-time emails in this chain:

- The email in the chain, dated March 28, 2017, 2:54 PM, from Brienne Jackson, Senior Counsel, Licensing & Enforcement, SoundExchange, to C. Colin Rushing, SoundExchange’s in-house Chief Legal Officer, regarding [REDACTED].
- The email, dated March 28, 2017, 7:14 PM, from Mr. Rushing to Ms. Jackson, regarding a different matter.

Both of these emails are protected by the work product rule. The only parties to these two emails are members of SoundExchange’s legal department, Ms. Jackson and Mr. Rushing.

As explained in the declaration of Brad Prendergast, attached as Exhibit A, after Music Choice invoked the defensive audit provision, Ms. Jackson, who was the person at SoundExchange in charge of overseeing the audit, Prendergast Decl. ¶ 4, discussed with Mr. Prendergast and Mr. Rushing the potential courses of action available to SoundExchange to respond to Music Choice's actions. Prendergast Decl. ¶ 11. These discussions included strategy surrounding the underlying *SDARS III* rate-setting proceeding as well as the possibility of litigation in other fora. *Id.* SoundExchange discussed these issues with outside counsel as part of developing a response. Prendergast Decl. ¶¶ 11, 13. These internal conversations and conversations with outside counsel have continued as the Remand proceeding has continued to be litigated. Prendergast Decl. ¶ 11. Although this email [REDACTED], it [REDACTED]
[REDACTED]
[REDACTED].

Prendergast Decl. ¶ 15. When these emails were sent, on March 28, 2017, the participants were preparing for the hearing in the *SDARS III* proceeding. *Id.* Music Choice's position on defensive audits, as discussed in this email exchange and in conversations with outside counsel, informed SoundExchange's position and arguments on the proposed terms at issue in the *SDARS III* proceeding.

As a result, this is a document produced "in contemplation of" litigation, which would not have been created "in substantially similar form" were it not for the potential for litigation. *Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d at 149. That Mr. Rushing, the head of SoundExchange's legal department, was involved in these discussions is further indication of their significance. Mr. Rushing would not typically be involved in the administration of SoundExchange's audits or in resolving day-to-day disputes SoundExchange has with a licensee

about its audits. Prendergast Decl. ¶ 7. However, he was involved here because of possible legal remedies SoundExchange explored as part of developing its response to Music Choice's actions. Prendergast Decl. ¶¶ 7, 11, 15. As a result, these emails with Mr. Rushing would not have existed in "substantially similar form" had those remedies not been on the table. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at 149.

Item #2: No outstanding issues remain.

Item #3: Item #3 is a series of emails between Ms. Jackson (a SoundExchange attorney) and independent auditor Lewis Stark of Prager Metis. SoundExchange contends that the first and third of these emails are protected by the work-product rule:³

- The email from Ms. Jackson to Mr. Stark, dated April 3, 2017, 2:40 PM, regarding [REDACTED].
- The email from Ms. Jackson to Mr. Stark dated April 3, 2017, 10:05 AM, regarding [REDACTED].

Ms. Jackson sent both of these emails to Mr. Stark following discussions among the members of SoundExchange's legal department and outside counsel about the possible legal remedies available to SoundExchange in response to Music Choice's refusal to cooperate with SoundExchange's audit of its PSS. Prendergast Decl. ¶ 11, 16. The 2:40 PM email at the top of the email chain expressly [REDACTED]. Email from Brienne Jackson to Lewis Stark, RE: Music Choice (Apr. 3, 2017); Prendergast Decl. ¶ 16; *see Exxon Corp.*, 663 F.2d at 129 (applicable to ongoing litigation). The discussion among SoundExchange's legal

³ SoundExchange has withdrawn its request to have the remaining emails in Item #3 withheld pursuant to the accountant-client privilege. SoundExchange has produced a copy of Item #3 to Music Choice, in which the remaining two emails in this chain are not redacted.

team and outside counsel that led to the planned course of action described in the email informed SoundExchange's position and arguments in the *SDARS III* proceeding. Prendergast Decl. ¶¶ 11, 13, 16. As a result, the work-product rule's requirements are satisfied because this email was sent "in contemplation of litigation"; and, because the express references to potential litigation would not have been present, and thus the document would not have existed in substantially similar form, absent the contemplated litigation. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at. 149.

Item #4: Two issues regarding Item #4 remain in dispute:

- One email in this chain is work product: The email dated November 8, 2017, from Brad Prendergast, an in-house counsel at SoundExchange, to three independent auditors – Mr. Stark, Aleka Mazarakis and Michael Gibson (all working at Prager Metis) – and to Katie Beiter, a SoundExchange Senior Manager of Licensing and Enforcement, who is a member of the legal department staff and reports to in-house attorneys.⁴
- Additionally, the Judges ordered SoundExchange to produce the work papers identified in the October 13, 2017 email contained in the same chain. July 29, 2021 Order at 5 (directing recipient to [REDACTED]).

First, the November 8, 2017 email from Mr. Prendergast to the auditors is protected by the work product privilege because this communication would not have existed in substantially the same form, but for the *SDARS/PSS III* litigation. That litigation was (and is) ongoing. The email [REDACTED]. At that time the parties had submitted briefs to the Register and were awaiting both her Opinion and the Judges' initial determination. *See supra* at 3. When Music Choice invoked the defensive audit provision in March 28, 2017, *see* Item #1, the rebuttal discovery phase of the underlying *SDARS III* proceeding was well underway and trial was about to begin. Prendergast Decl. ¶ 12.

⁴ SoundExchange has now produced a copy of Item #4 to Music Choice, in which the remaining five emails in this chain are not redacted.

As explained in his declaration, Mr. Prendergast is not typically involved with the routine day-to-day administration of SoundExchange's audits. Prendergast Decl. ¶ 5. He became involved in the audit of Music Choice that took place from 2016 to 2018 after Music Choice invoked the defensive audit provision. Prendergast Decl. ¶¶ 10-11. At the time he sent this email, Mr. Prendergast had temporarily taken over Ms. Jackson's audit-related responsibilities while she was on parental leave. Prendergast Decl. ¶ 21. While Ms. Beiter continued to handle the day-to-day administration of SoundExchange's audits while Ms. Jackson was on leave, Mr. Prendergast was more personally involved in overseeing the Music Choice Audit given the defensive audit dispute and its relevance to the issues under consideration in the *SDARS III* proceeding. Prendergast Decl. ¶ 21.

Mr. Prendergast sought to determine whether to pursue litigation or take other action in response to Music Choice's invocation of the defensive audit provision and refusal to allow SoundExchange to audit its PSS. Prendergast Decl. ¶ 18. As reflected in the emails identified by the Judges as Item #11 and Item #12, he consulted SoundExchange's outside counsel at Jenner & Block LLP in furtherance of this purpose. Prendergast Decl. ¶¶ 11, 13, 27, 32. The November 7 email reflects those discussions, including [REDACTED]
[REDACTED]
[REDACTED]. Prendergast Decl. ¶ 20. This position explicitly took into account the forthcoming *SDARS III* determination. *Id.* Thus, the November 7 email was sent "in contemplation of litigation"—or more precisely, in contemplation of the continuance of ongoing litigation. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at 149; Prendergast Decl. ¶ 20. It was the direct result of conversations about potential legal remedies. *See* discussion of Items #1, and #3, *supra* at 4-8.

With respect to the requested attachments, SoundExchange is unable to produce them. SoundExchange did not withhold the referenced work papers; rather, it does not have and has never had possession, custody, or control of these documents. Prendergast Decl. ¶ 19. The email to which the work papers appear to have been attached was sent from Irene Gasis at BDO to Ms. Mazarakis at Prager Metis, neither of whom was a SoundExchange employee. Email from Ms. Gasis to Ms. Mazarakis (Oct. 13, 2017). No one from SoundExchange was copied on the email from Ms. Gasis to Ms. Mazarakis, nor was the attachment forwarded to anyone at SoundExchange. Prendergast Decl. ¶ 19. By contrast, it is very likely that Music Choice has access to these work papers, which were prepared by BDO at Music Choice's request, and were based upon information provided to BDO by Music Choice.

Item #5: Item #5 is a cover email transmitting an attachment. Without waiving any claim or privilege, SoundExchange does not at this time object to the production of the cover email in Item #5. SoundExchange has now produced this cover email to Music Choice.

The Judges have asked SoundExchange to identify the attachment to Item #5. July 29 Order at n.9. The attachment to the email in Item #5 is an identical copy of the October 13, 2017 memo prepared by Prager Metis that is identified in SoundExchange's privilege log as Item #7. *See infra* at 11 (discussing applicability of the work product rule to this document); *see also* Prendergast Decl. ¶ 25.

Item #6: Item #6 is a cover email transmitting the same attachment. Without waiving any claim or privilege, SoundExchange does not at this time object to the production of the cover email in Item #6. SoundExchange has now produced this cover email to Music Choice. Again, the attachment to Item #6 is identical to Item #7. *See infra* at 11 (discussing applicability of the work product rule to this document); Prendergast Decl. ¶ 25.

Item #7: Item #7 is an October 13, 2017 memorandum prepared by SoundExchange’s independent auditors at Prager Metis, and sent to in-house counsel Mr. Prendergast and Ms. Jackson. As Mr. Prendergast explains, SoundExchange’s independent auditors do not typically provide it with documents of this nature. Prendergast Decl. ¶ 26 (Prager Metis ordinarily provides a final audit report, but not this type of document). Rather, SoundExchange requested that Prager Metis undertake an evaluation of BDO’s work papers so that SoundExchange could assess the impact of Music Choice’s “defensive audit” on its ongoing litigation, and could consider further legal remedies, including future litigation regarding the defensive audit provision. Prendergast Decl. ¶¶ 18, 26; Item #3, Email from Brienne Jackson to Lewis Stark, RE: Music Choice (Apr. 3, 2017). This evaluation of BDO’s work papers informed SoundExchange’s view as to the legal sufficiency of those audits and whether Music Choice’s invocation of its defensive audits was subject to legal challenge. Prendergast Decl. ¶¶ 18, 26. This request occurred in the context of discussions about ongoing and potential legal challenges with both internal and outside counsel, including the then-ongoing *SDARS III* proceeding. Prendergast Decl. ¶¶ 11, 13, 18, 26, 27; *see also supra* at 3-10 (discussing Items #1, 3-4). The defensive audit issue continued to be actively litigated in this proceeding, as it was raised in Music Choice’s appeal and ultimately remanded by the D.C. Circuit. Prendergast Decl. ¶ 23.

Additionally, Item #7 provides information about Music Choice’s underpayment of BES royalties. Although there is no requirement that potential litigation actualizes in order to fall under the work product rule, it did so in this case. This information contributed to SoundExchange’s evaluation of a possible claim against Music Choice, which ultimately resulted in the pending case in federal district court. *SoundExchange v. Music Choice*, No. 1:19-cv-999-RBW (D.D.C., filed Apr. 10, 2019); Prendergast Decl. ¶ 8.

Item #8: Only one of the emails in Item #8 remains in dispute:

- An email dated February 23, 2018, from Ms. Jackson, an in-house counsel at SoundExchange, to two independent auditors – Mr. Stark and Ms. Mazarakis (both working at Prager Metis).⁵

The second paragraph⁶ of the most recent email in the document, an email to Ms.

Mazarakis and Mr. Stark from Ms. Jackson, discusses [REDACTED]

[REDACTED]. Prendergast Decl. ¶28. This position was reached after consultation with

outside counsel and internal discussions among SoundExchange’s in-house counsel. *Id.*;

Discussion of Items #1, #3, #4, #7, *supra* at 4-11. The conclusion reflected in this email illustrates a strategic decision by SoundExchange that arose out of these discussions.

Prendergast Decl. ¶ 26. Although SoundExchange often consults outside counsel about complex legal disputes and potential litigation, it does not seek the advice of outside counsel on routine audit matters. Prendergast Decl. ¶ 13. This email warrants protection under the work-product rule because it was sent “in contemplation of litigation,” and SoundExchange’s strategic consideration about how to move forward and whether to pursue litigation at that time would not have been present, and thus could not have occurred in substantially similar form, absent the ongoing and contemplated litigation. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at 149.

Item #9: Item #9 is an email sent from Mr. Stark at Prager Metis to Mr. Prendergast, Ms. Jackson, and Denise Burrell at SoundExchange. It refers to the same evaluation that is the

⁵ SoundExchange has now produced a copy of Item #8 to Music Choice, in which the remaining six emails in this chain are not redacted. These emails identify a particular auditing procedure, referenced by the Judges in the July 29 Order. July 29 Order at 8 n.12. SoundExchange does not object to the Judges identifying that auditing procedure in the Restricted record.

⁶ As the Judges noted in their Order, the first paragraph relates to an audit of a different licensee, and is not relevant to the present issues. July 29, 2021 Order at 8.

subject of Item #7. Prendergast Decl. ¶ 29; Discussion of Items #1, #3, #4, #7, *supra* at 4-11. As Mr. Prendergast explained, that evaluation, and this communication [REDACTED], were necessary for SoundExchange to evaluate how to respond to Music Choice's invocation of the defensive audit procedure and refusal to comply with SoundExchange's audit of Music Choice's PSS. Prendergast Decl. ¶¶ 26, 29. This analysis was necessary to help SoundExchange evaluate the strength of its possible claims against Music Choice, including in the *SDARS III* proceeding. Prendergast Decl. ¶ 26. As a result, this document is protected by the work-product rule for the same reasons that Items #1, #3, #4, #7, and #8 are protected by the work-product rule.

Boehringer Ingelheim Pharmaceuticals, 778 F.3d at 149.

Ms. Burrell's inclusion on the email does not undermine the claim of privilege. Ms. Burrell worked at SoundExchange from August 2015 through September 6, 2017, and reported to members of the legal department. Prendergast Decl. ¶ 30. Although Mr. Stark copied her on his October 2017 email, Ms. Burrell could not have received it. Her access to her former SoundExchange email address (dburrell@soundexchange.com) was discontinued the previous month when she left the organization. Prendergast Decl. ¶ 30.

Finally, the attachments to the email identified in Item #9 do not relate to Music Choice. As the Judges surmised, these attachments relate to the other licensee referenced in Item #9. As a result, SoundExchange has not produced these attachments, which are both confidential and unresponsive to any request in this proceeding.

Item # 10: This document is an "Audit Program Report," an internal SoundExchange document that [REDACTED]. SoundExchange has confidentiality concerns around disclosing some of the information concerning non-Music

Choice licensees detailed in this document. The names of the licensees that SoundExchange has audited, the years covered by those audits, and the identities of the auditors conducting those audits are all publicly available information. Prendergast Decl. ¶ 31. However, SoundExchange keeps confidential [REDACTED]

[REDACTED]. *Id.* These aspects of the Report reflect information that is provided by licensees to SoundExchange in confidence [REDACTED]. *Id.*

The only information in this document that bears on the instant remand protected by the work-product rule. The [REDACTED] column entry for Music Choice reflects [REDACTED]

[REDACTED]. Prendergast Decl. ¶ 31. This entry reflects the same conclusion and strategic decision SoundExchange reached after consultation with outside counsel about responding to Music Choice’s invocation of the defensive audit provision, discussed with respect to Items #1, #3, #4, # 7, #8, and #9, *supra*. Prendergast Decl. ¶¶ 11, 13, 18. As a result, the [REDACTED] cell for Music Choice would have been different absent the contemplated potential litigation, and is protected under the work-product rule. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at. 149.

The remaining information contained in this document is not about Music Choice and is not responsive to any request. Music Choice’s pending motion to compel seeks the production of “investigation and analysis conducted by SoundExchange’s accountants at Prager Metis with respect to Music Choice’s defensive audits conducted by BDO.” Music Choice Mot. at 1. The

only arguably responsive, non-public information is contained in a single cell: the [REDACTED] entry for Music Choice. If the information in this one cell is withheld as work product (as it should be), there is no reason to produce even a redacted version of this document to Music Choice. Allowing Music Choice access to a redacted version of this document that contains only irrelevant information about audits of other licensees would not serve any purpose in this litigation, and it would needlessly disclose confidential information about other digital music services—including those with which Music Choice competes. As a result, the Judges should not compel the production of this document, even in redacted form.

Item # 11: Item #11 contains an exact duplicate of the email and attachment identified in Item #5.

Item #12: Only one of the emails in Item #12 remains in dispute:

- An email dated October 23, 2017, from Mr. Prendergast to Mr. Rushing, regarding [REDACTED].⁷

This email reflects the advice Mr. Prendergast received from SoundExchange's outside counsel, Steve Englund of Jenner & Block LLP. Prendergast Decl. ¶ 32. Although SoundExchange often involves outside counsel about complex legal disputes and potential litigation, it does not seek the advice of outside counsel on routine audit matters. Prendergast Decl. ¶ 13. Mr. Prendergast consulted with outside counsel to evaluate the potential legal claims SoundExchange could make regarding Music Choice's use of the defensive audit provision—in a proceeding before the CRB or elsewhere. Prendergast Decl. ¶ 32. The issues under consideration require analysis of legal claims that could be pursued in potential future legal action. *Id.* The subjects discussed in this email and the decisions about how to proceed

⁷ The other email contained in this document is an exact duplicate of the email identified in Item #5, which SoundExchange has now produced to Music Choice, *see supra* at 10.

articulated therein do not arise during a typical audit where there is no possibility of litigation.

Prendergast Decl. ¶ 32. As a result, for the same reasons that Items #1, #3, #4, #7, #8, and #9 are protected by the work-product rule this document is also protected by the work-product rule.

Boehringer Ingelheim Pharmaceuticals, 778 F.3d at 149.

IV. SoundExchange Should Not Be Required to Make an Early Attorney's-Eyes Only Production

The Judges also requested that SoundExchange provide “its position on Music Choice’s ability to obtain ‘attorney’s-eyes only’ access to the outstanding withheld documents.” July 29, 2021 Order at 12. SoundExchange opposes such access.

Permitting Music Choice’s attorneys to access the documents on an attorney’s-eyes only basis would lead to the same result as granting the Motion to Compel. Even if the Motion is granted, all of the outstanding documents contain SoundExchange’s confidential information and therefore qualify as Restricted pursuant to the protective order governing this proceeding. June 15, 2016 Protective Order at 2 (Restricted information includes information that would “(1) result in a competitive disadvantage to the Producing Participant, (2) provide a competitive advantage to another Participant or entity, or (3) interfere with the ability of the Producing Participant to obtain like information from other Participants or entities in the future”).⁸

⁸ Although satisfaction of any one of these factors would provide a sufficient basis to categorize documents as Restricted under the terms of the Protective Order, confidential information in the withheld documents qualify as Restricted under all three factors. Disclosing its litigation and strategy considerations, would put SoundExchange at a disadvantage relative to Music Choice in this proceeding and the pending underpayment litigation; and, revealing SoundExchange’s strategy around audits more generally could prejudice its ability to fairly assess the royalty payments of licensees it might audit in the future. Additionally, to the extent that production of withheld documents like the Audit Status Report contain information about other digital music services with which Music Choice competes, disclosure would give Music Choice a competitive advantage over these other licensees and would give Music Choice insider information as to the settlement amounts that SoundExchange has accepted based on audits of these entities. Finally, were statutory licensees unsure whether confidential information shared with SoundExchange in

Documents marked as Restricted cannot be provided to the parties themselves, and can only be accessed by outside counsel and a limited subset of other individuals, who are do not appear to be involved at this stage in the litigation. June 15, 2016 Protective Order at 2 (Restricted documents are available to outside counsel, independent contractors, consultants, and experts). The protective order does not contemplate the “Restricted” serving as a substitute for a participants’ right to withhold privileged information from discovery. No participant in the five-year history of this case has suggested otherwise, either explicitly or through practice—and rightly so. The harm of disclosing work product – which includes litigation strategy and reflects legal decision-making, including on the very issues still in dispute – is not lessened by restricting it from the view of Music Choice itself. To the contrary, disclosing this information to Music Choice’s outside counsel may be particularly prejudicial to SoundExchange, as outside counsel is intimately involved in presenting arguments on the other side and an inside view into SoundExchange’s litigation strategy and views of the law would undoubtedly aid them in doing so. Allowing “early access” would allow Music Choice an end-run around the discovery process, and would give their attorneys full access to privileged information even if the Judges ultimately determine that the documents containing this information have been properly withheld.

CONCLUSION

For the foregoing reasons and the reasons articulated in SoundExchange’s Opposition to Music Choice’s Motion to Compel, the Judges should deny Music Choice’s Motion to Compel as to the outstanding withheld documents.

the course of royalty examinations would remain confidential, they would undoubtedly be less inclined to cooperate in audits and comply with information requests.

Dated: August 12, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)

JENNER & BLOCK LLP

1099 New York Avenue NW, Suite 900

Washington, DC 20001

(202) 639-6000

echapuis@jenner.com

Counsel for Plaintiff SoundExchange, Inc.

EXHIBIT A

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR

(2018–2022) (Remand)

DECLARATION OF BRADLEY E. PRENDERGAST

Pursuant to 28 U.S.C. § 1747, I, Bradley E. Prendergast, hereby declare under penalty of perjury as follows in support of SoundExchange’s Further Briefing in Opposition to Music Choice’s Motion to Compel:

1. I am Assistant General Counsel for Licensing and Enforcement at SoundExchange, Inc., a position that I have held since January 2019. Prior to that, I was Counsel and then Senior Counsel for Licensing and Enforcement since January 2010. I am familiar with the facts and circumstances in this proceeding and submit this declaration based on my own personal knowledge.

2. I am part of SoundExchange’s five-attorney legal team. My colleagues include Brienne Elpert Jackson, Assistant General Counsel, Licensing and Enforcement. Both Ms. Jackson and I report to SoundExchange’s Chief Legal Officer, C. Colin Rushing.

3. Although she is not an attorney, Katie Beiter, Senior Manager, Licensing and Enforcement, also works within SoundExchange’s legal department. Ms. Beiter reports to both Ms. Jackson and me.

4. When SoundExchange conducts audits of its licensees, pursuant to 37 C.F.R. §§ 380.6, 382.7, Ms. Jackson typically oversees that work with assistance from Ms. Beiter. Although Ms. Jackson delegates aspects of the day-to-day management of audits to Ms. Beiter, she personally handles more complex or sensitive matters, including those that raise legal questions or that may implicate rate-setting, litigation, or policy matters.

5. Among my responsibilities as Assistant General Counsel for Licensing and Enforcement, is overseeing SoundExchange's participation in rate-setting proceedings before the Copyright Royalty Board ("CRB"). The day-to-day management of SoundExchange's audits of its licensees is not within my purview, but I am familiar with this process and am periodically involved. For instance, when Ms. Jackson was on leave in the fall of 2017, I took on this aspect of her role. Because of my role in overseeing CRB rate-setting proceedings, I am also involved in audits of licensees to the extent that they may affect current or future proceedings or relate to issues implicated therein.

6. Ms. Jackson and Ms. Beiter notify me of audit-related issues that they believe require my input or awareness.

7. Ms. Jackson keeps Mr. Rushing apprised of the status of audits of licensees. She elevates important legal issues arising out of audits – such as those that involve legal risk in litigation or rate-setting proceedings – to Mr. Rushing for his input and awareness. More routine audits or aspects of audits do not require Mr. Rushing's involvement.

8. SoundExchange's audits of its licensees, at times, provide grounds for legal action in federal court or before the CRB. For example, in 2019, SoundExchange filed a lawsuit against Music Choice in the United States District Court for the District of Columbia. *See SoundExchange v. Music Choice*, No. 1:19-cv-999-RBW (D.D.C., filed Apr. 10, 2019) (the

“Underpayment Case”). This lawsuit is based, in part, on information derived from the examination of Music Choice’s 2013-2016 royalty payments, which independent auditor Prager Metis CPAs conducted on behalf of SoundExchange in 2016 through 2018 (“Music Choice Audit”). Specifically, the Music Choice Audit revealed that Music Choice has systematically underpaid the statutory royalties owed for its Business Establishment Service. *See id.*

9. Music Choice is frequently adverse to SoundExchange in legal disputes. In addition to the Underpayment Case, Music Choice is a regular participant in rate-setting proceedings, including the *PSS I*, *Web I*, *SDARS I*, *SDARS II*, and *SDARS III* proceedings. Because of this history of legal disputes, SoundExchange is particularly attuned to the prospect of litigation with Music Choice, the possibility that disagreements could result in legal action, and the likelihood that ongoing litigation could affect and be affected by interactions with this licensee.

10. During the course of the 2013-16 Music Choice Audit, I became aware that Music Choice stated that it had performed its own audits of its PSS and invoked the provision then found in 37 C.F.R. § 382.6(e) (the “defensive audit provision”), and refused to allow Prager Metis CPAs, the auditors retained by SoundExchange, access to the necessary materials to audit Music Choice’s PSS Service.

11. I am aware that during the course of the Music Choice Audit, Music Choice invoked the so-called “defensive audit” provision, then found in 37 C.F.R. § 382.6(e). At the time, I was involved in discussions with outside counsel as well as my colleagues in the SoundExchange legal department, including Ms. Jackson and Mr. Rushing, about potential courses of action available to SoundExchange in response to Music Choice’s invocation of that provision. These discussions included strategy surrounding the underlying *SDARS III* rate-

setting proceeding as well as the possibility of litigation in other fora. Our conversations internally and with outside counsel have continued as the instant dispute has been litigated before the Judges, the D.C. Circuit Court of Appeals, and now before the Judges again.

12. When Music Choice invoked the defensive audit provision in March 28, 2017, *see* Item #1, the rebuttal discovery phase of the underlying *SDARS III* proceeding was well underway and trial was about to begin. *SDARS III Final Determination*, 83 Fed. Reg. 65210, 65212 (evidentiary hearing commenced on April 12, 2017). SoundExchange and Music Choice were (and are) active participants in this rate-setting proceeding, and SoundExchange's proposal to clarify the scope of the defensive audit provision was (and is) among the issues being litigated.

13. In considering Music Choice's invocation of the defensive audit provision, and how the ongoing Music Choice Audit would impact SoundExchange's position in the *SDARS III* proceeding, I sought advice from outside counsel at Jenner & Block LLP. Attorneys at Jenner & Block advise SoundExchange on copyright issues and represent SoundExchange and other copyright owners in rate-setting matters, including *SDARS III*. Although SoundExchange often involves outside counsel about complex legal disputes and potential litigation, we do not seek the advice of outside counsel on routine audit matters.

14. I have reviewed the documents listed on SoundExchange's privilege log, including those documents for which the Judges ordered further briefing in response to Music Choice's Motion to Compel.

15. I have reviewed the document identified by the Judges as Item #1. I am familiar with the contents of this document and the topics discussed therein. The two most recent-in-time emails memorialize [REDACTED]

[REDACTED]

[REDACTED]. When these emails were sent, on March 28, 2017, the rebuttal phase of the *SDARS III* proceeding was ongoing and the participants were preparing for trial. Music Choice's position on defensive audits, as discussed in this email exchange and in conversations with outside counsel, informed SoundExchange's position and arguments on the proposed terms at issue in the *SDARS III* proceeding.

16. I have reviewed the document identified by the Judges as Item #3. I am familiar with the contents of this document and the topics discussed therein. The most recent-in-time email in that document, an email to Mr. Stark from Ms. Jackson, includes Ms. Jackson's communication to Mr. Stark about [REDACTED]. On its face, this email reflects [REDACTED]
[REDACTED]. At the time of this document on April 3, 2017, the parties were deep in preparation for the hearing in the *SDARS III* proceeding, which began later that month. I and others from SoundExchange consulted with outside counsel on the issues reflected in Item #3, and those discussions informed SoundExchange's position and arguments in the *SDARS III* proceeding.

17. I have reviewed the document identified by the Judges as Item #4. I am familiar with the contents of this document and the topics discussed therein. The email chain as a whole includes communications about [REDACTED]
[REDACTED]
[REDACTED].

18. Initially, Music Choice had provided BDO's final audit report but refused to provide SoundExchange or Prager Metis with other requested information about its PSS. After some negotiation, Prager Metis (but not SoundExchange) was granted access to a subset of

BDO's work papers. As part of SoundExchange's attempt to determine whether to pursue litigation or take other action in response to Music Choice's invocation of the defensive audit provision and refusal to allow SoundExchange to audit its PSS, we requested that Prager Metis provide us with analysis about the scope and sufficiency of Music Choice's defensive audits. Item #7, discussed below, includes this analysis.

19. Item #4 includes an October 13, 2017 email from Irene Gasis at BDO to Aleka Mazarakis at Prager Metis, which [REDACTED]. No one from SoundExchange was copied on that email and, to the best of my knowledge, the referenced work papers were not forwarded to anyone at SoundExchange. SoundExchange has not at any time possessed copies of BDO's work papers.

20. Item #4 also includes a November 8, 2017 email from me to Ms. Mazarakis and others at Prager Metis. In it, I advised Prager Metis on [REDACTED]
[REDACTED]
[REDACTED]. SoundExchange's position explicitly took into account the forthcoming *SDARS III* determination, which would be issued the following month.

21. At the time I sent this email, Ms. Jackson was on parental leave and I had temporarily taken over her audit-related responsibilities. Under my supervision, Ms. Beiter continued to handle the day-to-day administration of SoundExchange's audits of licensees, but surfaced any important legal issues to me. Because of the defensive audit dispute and its relevance to the issues under consideration in the *SDARS III* proceeding, I was more personally involved in the Music Choice Audit than in more routine matters.

22. The position I conveyed to Prager Metis in my November 8, 2017 email was based on consultation with outside counsel and with my colleagues in the SoundExchange legal department. Again, our discussions involved the potential future litigation regarding the defensive audit position in the CRB or elsewhere.

23. Now, nearly four years after the Judges' initial determination in *SDARS III*, Music Choice and SoundExchange are continuing to litigate this issue. As the Judges know, the dispute regarding defensive audits has now been litigated in the CRB, in the D.C. Circuit Court of Appeals, and again in this remand proceeding.

24. I have reviewed the documents identified by the Judges as Items #5, #6, and #7. I am familiar with the contents of these documents and the topics discussed therein. Item #7 is a memo Prager Metis prepared for SoundExchange [REDACTED]. As discussed *supra* at ¶ 18, SoundExchange requested of Prager Metis this analysis to evaluate the scope and sufficiency of Music Choice's defensive audit and potential future litigation on this issue.

25. I understand the references to attachments in Item #5 and Item #6 to refer to Item #7. To the best of my knowledge, there is no difference between Item #7 and the attachments to Item #5 and Item #6.

26. The memo identified as Item #7, however, is different from the type of document typically provided to SoundExchange during the course of a routine audit. In the course of examining the royalties of statutory licensees, SoundExchange's typically receives a draft audit report stating the findings of its independent auditor. SoundExchange's auditors do not typically perform the type of analysis in Item #7, nor does SoundExchange typically request that they do so. In this instance, SoundExchange's internal and outside counsel determined that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. Specifically, this analysis was necessary to
[help us evaluate the strength of our possible claims against Music Choice], including in the
SDARS III proceeding.

27. After receiving Item #7 from Prager Metis, I provided this analysis to
SoundExchange's outside counsel at Jenner & Block LLP. This can be seen in the document
identified by the Judges as Item #11.

28. I have reviewed the document identified by the Judges as Item #8. I am familiar
with the contents of this document and the topics discussed therein. The most recent email in the
document is email from Ms. Jackson to Ms. Mazarakis and Mr. Stark. In the second paragraph,
it discusses [REDACTED]
[REDACTED]. This position was
reached after consultation with outside counsel and a number of internal discussions among
SoundExchange's in-house counsel, discussed *supra*.

29. I have reviewed the document identified by the Judges as Item #9. I am familiar
with the contents of this document and the topics discussed therein. This email from Mr. Stark
to me [REDACTED]
[REDACTED]
contained in Item #7, and arose from the same context. *See supra* at ¶¶ 18, 24, 26 (discussing
context of evaluation).

30. Denise Burrell, who is copied on Item #9, worked at SoundExchange from
August 2015 through September 6, 2017. Ms. Burrell was an administrative assistant, whose

role included providing support to the legal department. Because this email was sent in October 2017, after Ms. Burrell left SoundExchange, she could not have received it. At this time, she no longer had access to her SoundExchange email account (dburrell@soundexchange.com).

Although I cannot be certain why Mr. Stark included Ms. Burrell on this email, I presume he did so because he was unaware that she had left the company. It was not unusual for auditors and other vendors to copy Ms. Burrell on legal communications, especially when submitting invoices.

31. I have reviewed the document identified by the Judges as Item #10, an Audit Program Report which [REDACTED]. I am familiar with the contents of this document and the topics discussed therein. I understand that the Judges seek SoundExchange's view on the confidentiality of information contained in Item #10. This is an internal SoundExchange document for use within the legal department, which contains confidential information about multiple licensees (most of whom are not involved in this remand proceeding). Specifically, SoundExchange keeps confidential [REDACTED]. Often these aspects of the Report reflect information that is provided by licensees to SoundExchange in confidence [REDACTED]. The names of the licensees, years covered, and identity of the auditors listed in this Audit Program Report are all publicly available information. I understand that the reference to [REDACTED].

32. I have reviewed the document identified by the Judges as Item #12. I am familiar with the contents of this document and the topics discussed therein. The last-in-time email in this document is dated October 23, 2017 and sent from me to Mr. Rushing. As noted, it reflects legal advice I received from SoundExchange's outside counsel, Steven Englund of Jenner & Block LLP. I consulted with Mr. Englund in order to evaluate the potential legal claims SoundExchange could make regarding Music Choice's use of the defensive audit provision—in a proceeding before the CRB or elsewhere. *See supra* at 13. The issues under consideration require analysis of legal claims that could be pursued in potential future legal action. In my experience, the subjects discussed in this email and the decisions about how to proceed articulated therein do not arise during a typical audit where there is no possibility of litigation.

Pursuant to 28 U.S.C. § 1747, I hereby declare under penalty of perjury under the laws of the United States that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

Dated: August 12, 2021

A handwritten signature in blue ink, appearing to read "BE Prendergast", is positioned above a horizontal line.

Bradley E. Prendergast

Proof of Delivery

I hereby certify that on Thursday, August 12, 2021, I provided a true and correct copy of the SoundExchange's Brief in Further Opposition to Music Choice's Motion to Compel to the following:

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Signed: /s/ Emily Chapuis